Supreme Court, U.S.
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No. 05-1311

IN THE

Supreme Court of the United States

CITIZENS FOR HEALTH, *et al.*,

Petitioners,

v.

MICHAEL O. LEAVITT,
Secretary of Health and Human Services,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* CONSUMER ATTORNEYS OF CALIFORNIA, FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS, CONGRESS OF CALIFORNIA SENIORS, CALIFORNIA CONSUMER FEDERATION, AND HEALTH ADMINISTRATION RESPONSIBILITY PROJECT IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICI* [1]

Consumer Attorneys of California ("Consumer Attorneys") is a voluntary membership organization representing approximately 6,000 associated attorneys practicing throughout California. The organization was founded in 1962. Its membership consists primarily of attorneys who represent individuals subjected in a variety of ways to personal injury, employment discrimination, and other harmful business and governmental practices. Consumer Attorneys has taken a leading role in advancing and protecting the rights of injured consumers in both the courts and the Legislature.

Foundation for Taxpayer and Consumer Rights (FTCR) is a nationally recognized, California-based nonprofit, nonpartisan consumer watchdog organization that specializes in insurance and health care reform. Founded in 1985, FTCR advocates for the rights of patients, ratepayers, and policyholders and seeks to make corporations accountable in court. FTCR has a strong interest in upholding the privacy protections of California consumers, particularly their right to medical privacy.

Congress of California Seniors (CCS) is a statewide non-profit education and advocacy organization dedicated to improving the life of seniors and their families. CCS

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1. This brief has been authored in its entirety by undersigned counsel for the *amici curiae*. No person or entity, other than the named *amici* and their counsel, made any monetary contribution to the preparation and submission of this brief. The parties have consented to the filing of this brief and their letters of consent are being lodged herewith.

devotes its efforts to legislative and consumer affairs that deal primarily with issues concerning older adults. CCS conducts research, analyzes issues and provides voter and consumer education to its members. Through an effective legislative committee, CCS initiates and monitors legislation, testifies at hearings and takes appropriate grass-roots action on pending and proposed legislation. When necessary, CCS initiates or joins in lawsuits to protect consumers. CCS's constituents will be seriously impacted by the decision here and is therefore vitally interested in the issues presented here.

California Consumer Federation (CCF) is non-profit consumer advocacy organization, established in 1960, for the purpose of enacting consumer protection laws and regulations, ensuring their enforcement and conducting education and research on consumer matters. CFC has filed amicus briefs in both state and federal courts in matters, such as this one, that relate to the protection of consumers. CFC has extensive experience relating to the problems faced by consumers when they are subjected to invasion of their medical privacy.

Health Administration Responsibility Project (HARP) is a non-profit organization that serves as an educational and informational resource for patients, doctors, and attorneys regarding managed care organizations, and seeks to enhance the quality of medical care benefits provided in the managed care setting. Because this case implicates medical privacy issues, HARP has an immediate interest in assuring that medical privacy protections remain viable and enforceable.

The issue in this case is one of grave importance to consumers. As discussed below, maintaining the privacy of their medical information is universally an issue that consumers care very deeply about. Because the Amended Rule significantly impacts the right to medical privacy, it is an issue which the *amici* believe they have a responsibility to address with this Court. Additionally, the response of the medical industry in California has been to apply the Amended Rule as though it had preemptive effect and has resulted in significant breaches of California's own privacy statutes. Accordingly, the *amici* have a vital interest in protecting California consumers from unwarranted and illegal violations of their medical privacy which result from the inappropriateness of the Amended Rule.

Counsel for the *amici* is familiar with the issues and the arguments presented by the parties whom this brief is submitted in support of and this brief is intended to emphasize the public policy considerations underlying the legal analysis presented by the Appellants.

LEGAL ARGUMENT

I. Certiorari Should Be Granted Because, As A Matter Of Public Policy, Constitutionality And State Law Concerns, Medical Privacy Is An Issue Of Overwhelming Importance And The Court Of Appeals Decision Opens The Door To Massive Invasion Of The Public's Constitutional Right To Privacy Of Their Medical Affairs

The right to privacy, generally, is not only an issue of constitutional magnitude, it is an issue of overwhelming importance to the vast majority of Americans. A 1999 Gallup poll found that 78% of Americans "feel it is very important that their medical records be kept confidential." (Institute for Health Freedom, *Public Attitudes Toward Medical* Privacy, The Gallup Organization, September 2000, available at *http://forhealthfreedom.org/Gallupsurvey/IHF-Gallup.html*, accessed June 9, 2006.) Even after receiving a flurry of HIPPA privacy notices from medical providers, 67% of Americans are still concerned about privacy of their medical records and 13% have actually put their health at risk in order to avoid disclosure of private medical information. (National Consumer Health Privacy Survey, 2005, California HealthCare Foundation, Forrester Research, Inc., available at *http://www.chcf.org/topics/view.cfm ?itemID=115694*, accessed June 9, 2006.)

And this concern is echoed in the decisions of this Court, in state constitutional amendments and in statutes passed by Congress itself:

- This Court recently reiterated the importance and fundamental nature of the right to privacy in striking down

the Texas anti-sodomy law. (*Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003).)

- California's constitution was amended to confirm privacy as a fundamental right. (Cal. Const., Article 1, section 1.)

- Congress passed the Gramm-Leach-Bliley Act in order to specifically protect citizens' financial privacy. (*See* 15 U.S.C. sections 6801, *et seq.*)

The importance of the right to privacy was recognized over a century ago — even before the advent of the "Information Age" and the Internet. In 1890, Louis Brandeis and Samuel Warren acknowledged in their Harvard Law Review article that "[o]f the desirability — indeed of the necessity — of some protection [of privacy], there can, it is believed, be no doubt." (Warren & Brandeis, 4 Harv. Law. R., No. 5, December 15, 1890.)

One of the most compelling discussions of the importance of medical privacy was made by the prior administration's Secretary in enacting the Original Rule. (*See* 65 Fed. Reg. 82,462.) The Secretary first recognized that "[p]rivacy is ***a fundamental right.***" (*Id.*, at 82,464; emphasis added.)

More specifically with respect to the goals and purposes of HIPPA, the Secretary acknowledged that the purpose of the regulations authorized by Congress under HIPPA was to "establish[ ] standards and ***protections*** for health information systems." (*Id.*, at 82, 463; emphasis added.) Further, the Secretary declared that "[i]n enacting HIPPA, Congress recognized the fact that ***administrative simplification cannot succeed if we do not also protect the privacy and confidentiality of personal health information.***" (*Id.*; emphasis added.)

Finally, the Secretary concluded that, because of the high level of public concern about the confidentiality of medical records, privacy protections are essential "for the effective delivery of health care, both to individuals and populations" and "is a ***necessary foundation*** for delivery of high quality health care." (*Id.*, at 82,467.) Most compellingly, the Secretary noted:

> In short, ***the entire health care system is built upon the willingness of individuals to share the most intimate details of their lives with their health care providers***. The need for privacy of health information, in particular, has long been recognized as ***critical*** to the delivery of needed medical care. More than anything else, the relationship between a patient and a clinician is based on trust.
>
> * * *
>
> Individuals cannot be expected to share the most intimate details of their lives ***unless they have confidence that such information will not be used or shared inappropriately***. Privacy violations reduce consumers' trust in the health care system and institutions that serve them. Such a loss of faith can impede the quality of the health care they receive, and can harm the financial health of health care institutions. (*Id.*, emphasis added).

The Secretary's analysis in this regard emphasizes that the protection of medical privacy is the foundation upon which efficiencies in the delivery of health care must be built. In other words, it is not a situation where a balancing can

take place, *i.e.*, where privacy protections can be abrogated in order to enhance the efficient delivery of health care. This is a situation where, as the Secretary originally acknowledged, efficient delivery of health care cannot be achieved in the first instance ***unless*** adequate privacy protections are in place ***first***.

This is a reality: Efficient and effective medical care cannot be achieved in the absence of privacy protections. As explained in the National Consumer Health Privacy Survey, 2005, sponsored by the California Healthcare Foundation, 13% of consumers "put their health at risk by engaging in such behaviors as: avoiding their regular doctor, asking their doctor to fudge a diagnosis, paying for a test because they didn't want to submit a claim, or avoiding a test altogether" because of privacy concerns.

The Original Rule, in fact, accomplished the goal of providing efficient medical care without unwarranted invasion of the right to privacy. It established the minimum protections necessary for patient privacy, thereby enhancing the efficient delivery of medical care at the micro level, i.e., between the patient and the health care provider. The Original Rule then built upon that foundation a process for maximizing the efficiency of health care communications and interactions, ***while maintaining the foundational privacy protections***.

The Court of Appeals based its constitutional analysis on the precept that the HIPPA regulation is merely "voluntary," *i.e.*, that "covered entities" ***can*** agree to protect patients' privacy — if they want. (*Citizens for Health v. Leavitt*, 428 F.3d 167, 179-80 (3d Cir. 2005).) The practical reality that the Court of Appeals refused to face is that they simply don't want to. And they won't. Business and industry

— whether the healthcare industry or otherwise — survive on marketing and information. They want that information and they are voracious collectors of it. They will not "voluntarily" limit what they have access to. And a recent article in *Consumer Reports* provides a graphic example. As the March 2006 article notes, psychotherapy notes "may be given to an insurer's employees for "training purposes." One plastic surgeon's notice tells his patients that he "may use or disclose your demographic information and the dates that you received treatment from us in order to contact you for fund-raising activities supported by our office." (*Consumer Reports*, The new threat to your medical privacy, March 2006 Available at *http://www.consumerreports.org/ cro/health-fitness/health-care/electronic-medical-records 06/overview /index.htm*, accessed June 9, 2006.)

The Court of Appeals's attitude of unconcern about the practical effects on the average American of the disclosures that will occur as the result of the Amended Rule is insupportable. Review by this Court is imperative so that the congressional goals of HIPPA can be effectuated.

CONCLUSION

The right of medical privacy is of paramount importance to consumers. (65 Fed. Reg. 82,462, at 82,465; Institute for Health Freedom, *Public Attitudes Toward Medical* Privacy, The Gallup Organization, September 2000, available at *http://forhealthfreedom.org/Gallupsurvey/IHF-Gallup.html*, accessed June 9, 2006; National Consumer Health Privacy Survey, 2005, California HealthCare Foundation, Forrester Research, Inc., available at *http://www.chcf.org/topics/view. cfm ?itemID= 115694*, accessed June 9, 2006.) They, in fact, believe privacy is more important than the actual receipt of medical care itself, as evidenced by the fact that they would rather withdraw from the medical care system than risk privacy violations. (*Id.*, at 82, 468; National Consumer Health Privacy Survey, 2005, California HealthCare Foundation, Forrester Research, Inc., available at *http://www.chcf.org/topics/view. cfm ?itemID= 115694*, accessed June 9, 2006.) This, then, requires that the efficiencies in the delivery of health care be predicated on a sound foundation for protection of patient privacy rights. The Amended Rule fails to accomplish this goal and, in doing so, undermines congressional intent in enacting and implementing HIPPA. That being the case, review by this Court is essential in order to assure that congressional intent is enforced and the privacy protections needed and wanted by the American people are effectuated.

Respectfully submitted,

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